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(Winnipeg Centre)
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# COURT OF QUEEN'S BENCH OF MANITOBA

**B E T W E E N:**

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| KRYSTYNA URSHELA BRIGGS, | ) | COUNSEL: |
| | ) | |
| Applicant, | ) | G. J. Orle, Q.C. and |
| | ) | D. A. Chicoine |
| - and - | ) | For the applicant |
| | ) | |
| WINNIPEG CONDOMINIUM CORPORATION NO. 30 | ) | C. Everard |
| | ) | For the respondent |
| | ) | |
| Respondent. | ) | JUDGMENT DELIVERED: |
| | ) | February 14, 2007 |

## JEWERS J.

[1] This is an application for an order declaring that a contract for window replacement entered into by the respondent condominium corporation was *ultra vires* because it had not been approved by a vote of the unit owners. The position of the respondent is that the contract was with respect to a duty to maintain the property mandated by *The Condominium Act*, R.S.M. 1987, c. C170, and no vote was required.

[2] The respondent is a corporation incorporated under the *Act* and has the purpose of managing and maintaining a thirty-eight storey condominium complex

in Winnipeg, Manitoba, known as 55 Nassau North, for the benefit of the unit holders. There are approximately three hundred condominium units in the complex.

[3] The applicant is one of the owners of three of the units which collectively comprise a 0.9289% interest in the common elements. There is no dispute that the windows are part of the common elements.

[4] Since 1997 and perhaps earlier, there have been discussions by the corporation and the unit holders with respect to the replacement of the exterior windows. On January 28, 1997, a special meeting of the corporation passed certain motions related to the windows which purported to restrict the ability of the corporation regarding changes or work on the exterior envelope without certain steps being taken and studies being made. There was also a resolution that changes to the windows and the cladding of the building were deemed to be substantial additions, alterations or improvements or renovations and required an 80% vote to be implemented.

[5] On April 13, 2006 the respondent entered into a contract for $4,069,448.53 for the complete replacement of the exterior windows and installation of new aluminum panels at the complex with Gardon Construction Ltd. The contract was awarded without a vote of the unit holders.

[6] The applicant is a member of a group known as The Concerned Owners Committee (“COC”) which challenges the need for the contract and has demanded a vote of the unit owners. On October 4, 2006 the COC prepared a

petition to the Board of Directors of the respondent which, according to the affidavit of the applicant, was signed by 120 unit owners, representing 39.17% of the voting rights of the respondent, seeking a vote on the project. (The copy of the petition presented to the court contained only four signatures.) The petition was presented to the Board which refused to accept it.

[7] The petition not only sought a vote but also removal of the entire Board of Directors, the property manager and legal counsel.

[8] To pay for the contract the respondent has levied a special assessment on the unit holders to be applied according to the percentage allocation of the common expenses for each unit. The applicant has been assessed $39,822.00, payable over 3½ years for her share of the assessment.

[9] The initial installment was due on September 1, 2006, and subsequent installments are due on May 1, 2007, May 1, 2008 and January 1, 2009. To date approximately 94% of the unit owners have paid the initial installment. (Notwithstanding that the subsequent petition was said to have been signed by 120 owners.)

[10] The work under the contract has commenced and a number of windows have already been replaced; for example, the windows in one of the three units in which the applicant has an interest have been replaced.

[11] The affidavit evidence demonstrates the following:

> The Property was constructed in 1969 and 1970, and contains approximately 300 condominium units. The windows in the Property date back to the original construction, and as such are almost forty years old, which is twice as old as their expected lifespan.

> The original windows are now obsolete, and no new parts for them can be obtained. As such, repair work is extremely difficult for the respondent, though over the last five years, the respondent has expended an average of $10,422.46 annually to attempt to repair the windows. Further, some of the windows are beyond repair.
>
> The original windows in the Property leak excessively, and do not and cannot be made to comply with current Canadian Safety Association and National Building Code requirements.
>
> As a result of inspections conducted by the respondent's engineers, Crosier Kilgour & Partners Ltd. ("CKP"), fifty units in the Property were targeted as immediate problem units, due to corrosion of steel studs caused by air leakage and rain penetration. These windows are no longer sealed and as such wind and water can enter into the Property, causing water damage and a substantial draft. The respondent has had significant expenses relating to water damage to the common elements.
>
> In the spring of 2006, a piece of a window from the exterior of the Property suddenly fell to the ground from the 26th storey.

[12] As to this latter occurrence, there was no evidence as to the cause of the window piece falling although of course there was a reasonable suspicion that it might have been connected to the general obsolete condition of the windows.

[13] In April, 2006 the Board determined that the original windows were past their economic life and should be replaced.

[14] The *Act* provides as follows:

> **Obligations to repair and to maintain**
> **18(1)** For the purposes of this Act, the obligation to repair after damage and the obligation to maintain are mutually exclusive; and the obligation to repair after damage does not include any obligation to repair improvements made to units after registration of the declaration and plan.
>
> **Duty to repair**
> **18(2)** Subject to section 19, the corporation shall repair the units and common elements after damage.
>
> **Maintenance of common elements**
> **18(3)** The corporation shall maintain the common elements.

**Maintenance of units**
**18(4)** Each owner shall maintain his unit.

[15] The *Act* makes a distinction between "repair" and "maintenance" and even goes so far as to state that the two are "mutually exclusive", although I would have thought and some of the jurisprudence indicates that there may be an overlap between the two concepts.

[16] Here there is no question of "repair". The respondent takes the position that the windows are beyond repair and must be removed and replaced.

[17] There is a question however as to whether this replacement is "maintenance".

[18] Black's Law Dictionary (6) has these definitions:

(a) maintain – acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition;

(b) maintenance – the upkeep or preservation of condition of property, including cost of ordinary repairs necessary and proper from time to time for that purpose.

[19] There are many cases defining maintenance in various contexts and the term can be somewhat elusive and vague. I have selected two cases which I think are helpful and instructive.

[20] The first is *Sevenoaks, Maidstone & Tonbridge Rly. Co. v. London, Chatham & Dover Rly. Co.* (1879), 11 Ch. Div. 625. There, Sevenoaks owned a railway but agreed to give the complete operation and "maintenance" of the railway to a second railway company Maidstone. The Sevenoaks clientele were complaining about access to one of the stations so Sevenoaks installed a stone

stairway to facilitate the access. Maidstone tore it down, asserting that it was an interference with their unfettered right of maintenance. The issue was whether the installation was maintenance. Jessel MR stated in holding that it was maintenance:

> It is very difficult to define what works of maintenance are. It is a very large term, and useful or reasonable ameliorations are not excluded by it. For instance, if a company had power to maintain the banks of a river which were faced in a particular way, could it be supposed that they were restricted under the words of maintenance to keeping up the banks in precisely the same way, when the mode which might have been very good when the banks were originally formed had been very much improved on by the subsequent advance of science? So where a railway company have to maintain a railway, I should not at all doubt that in maintaining it they might use any reasonable improvement. If, for instance, the railway were originally fenced with wooden palings, and it were sought when they decayed to replace them by an iron fence, I should say that was fully within their powers. If the railway originally was made in a deep cutting, and it was thought desirable to face the cutting with brick to make it more secure, I should say that was fair maintenance. And if a railway station were found inconvenient, and it was desirable when it required repairs to alter the arrangement of the rooms, or to alter the access or form of access, and so ameliorate it at the same time that it was put in repair, I should say all that was within the powers of maintenance given by the legislature; that is, you may maintain by keeping in the same state or you may maintain by keeping in the same state and improving the state, always bearing in mind that it must be maintenance as distinguished from alteration of purpose.

[21] The second case is *ACT Construction Ltd. v. Customs and Excise Commissioners*, [1981] 1 All ER 324. There the foundations of a house were insufficient and contractors remedied the deficiency by inserting a concrete beam to underpin the house. The issue was whether the work was liable for value added tax; if the work was maintenance it was not; if the work was not merely maintenance it was liable for tax. The Court of Appeal held that the work was not maintenance but an alteration to a building. Lord Denning MR stated:

So I will turn to the meaning of the word 'maintenance'. Was this underpinning maintenance? 'Repair' and 'maintenance' are used in conjunction throughout the industry, and in the landlord and tenant cases. In the context of repair and maintenance to buildings, they are used every day. They are ordinary English words. Judges have tried from time to time to define them. They do the best they can. Always in relation to the particular case in hand. To my mind, definitions are not much help. I go by the observations made by Sachs LJ on this line of cases in *Brew Brothers Ltd. v. Snax (Ross) Ltd.* [1970] 1 All ER 587 at 602, [1970] 1 QB 612 at 640. That was a case about a bulging wall, and the question was about a covenant for repair and maintenance:

> 'In the course of their submissions counsel referred to a number of varying phrases which had been used by judges in an endeavour to express the distinction between the end-product of work which constituted repair and that of work which did not. They included "improvement", "important improvement", "different in kind", "different in character", different in substance", "different in nature", "a new and different thing", and just "something different" ... I doubt whether there is any definition – certainly not any general definition – which satisfactorily covers the above distinctions; nor will I attempt to provide one ... [The question is] whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly be termed repair.'

I would look at this case in that way. I ask myself what would an ordinary reasonable man say if he was asked, 'Look at this work of underpinning this house at a cost of £7,000 or more. Is that repairing the house? Is it maintaining the house?' I am sure he would say, 'Certainly not. I know what to "repair" a house is. If a window is broken, or one of the stairs is broken, that is "repair". I also know what "maintaining it" is. It has to be painted from time to time. It has to be cleaned. It has to be kept in good condition. That is "maintenance". But underpinning a house, that is not "maintenance".'

A word about the blue book [an official guide as to what is taxable]. If I were asked, 'Is putting in a damp course to a house which has never had one "repair" or "maintenance"?', I would agree with the commissioners that it is not maintenance. It should be zero-rated. If I were asked, 'If you are installing double-glazing for the first time, is that maintenance or is it not?', I would say it is clearly not maintenance. It should be zero-rated. So also if you are putting fixed cupboards in the house. It is 'alteration', but it is not 'maintenance'. I would agree with the commissioners on all those items. But, when I turn the page and find the things which are said to be positive-rated, I do not agree with some of these. They say that 'Shoring up and underpinning buildings' is maintenance. I do not agree. Take this case. It cost over £7,000 to underpin this building. That is not maintenance. Take an old wall which has to be kept up by making buttresses. That is not maintenance. Then again: 'Replacing one type of roof by another, e.g. slates by tiles.' The

> commissioners say that that is maintenance. I do not think so. It is an alteration which is far more than 'maintenance' requires.
>
> I have given those illustrations to show the problems which do arise in this particular Act. For myself, I think that each case has to be decided as it comes up according to the ordinary meaning which the ordinary man would give to these words. As each case is decided, the courts will build up a body of law so that people will know whether or not the work is zero-rated or positive-rated. In some respects the blue book give good guidance. In other respects it does not. So far as the law is concerned, the ultimate decision must rest with the judges and not with the tribunals whether these cases, which occur time after time, are zero-rated or positive-rated.
>
> In the result I come to the same conclusion as Drake J. I think that this was not maintenance. It was an alteration to a building, and under the provisions it should be zero-rated. I would therefore dismiss this appeal.
>
> (My emphasis)

[22] And then per Brandon LJ:

> It is possible to take up two extreme positions on the meaning of the expression 'maintenance' in note 2. One extreme position is to say that, if the work done involves an improvement to the building, it can never be maintenance. The other extreme position is to say that, if the work has the purpose of remedying an existing defect in the building or preventing a future defect from developing, it must always be maintenance. In my view, neither of these extreme positions is correct. The expression 'maintenance' should be given its ordinary and natural meaning. In regard to the first extreme position, there may well be cases where the work done, although it involves some degree of improvement (for instance, because of the use of modern or better materials or methods), is nevertheless maintenance in the ordinary and natural meaning of that word. For example, if metal gutters, which are liable to decay in time, are replaced with plastic gutters which are not liable to decay however long they remain there, that is an improvement to the building, but I would still regard that work as maintenance. With regard to the second extreme position, there may well be cases where, although the purpose of the work is to remedy existing or to prevent future defects in the building, it is nevertheless not within the expression 'maintenance' in the ordinary and natural meaning of that word. For example, if a building has a flat roof which leaks continuously and the owner decides to replace the flat roof with a pitched roof so as to eliminate that defect, then, although that work was designed to eliminate a defect, it would not in my view be maintenance in the ordinary and natural meaning of that word.

> In the present case the work done was not done to any existing part of the building; it was entirely new work. It involved a radical and fundamental alteration to the construction of the building as it had been before. It involved an extension of the existing building in a downward direction. Such work in my view is not capable of coming within the expression 'maintenance' in the ordinary and natural meaning of that word. It is conceded that, if that is right, then the work was work of alteration within the meaning of that expression in item 2 of Group 8 and is accordingly zero-rated.
>
> For the reasons which I have given, I agree with the decision of Drake J. that the value added tax tribunal was wrong in law and their decision should be set aside on that ground.
>
> I would dismiss the appeal.



[23] The applicant submits that the work is not mere maintenance but constitutes a substantial addition, alteration or improvement to the common elements or is a substantial change in the assets of the corporation requiring an 80% vote of approval of the unit holders. Alternatively, the applicant submits that the work is non-substantial requiring a majority vote of approval. The relevant subsections of the *Act* are as follows:

> **Substantial alterations**
> **16(1)** The corporation may, by a vote of members who own 80%, or such greater percentage as is specified in the declaration, of the common elements make any substantial addition, alteration or improvement to the common elements, or may make any substantial change in the assets of the corporation.
>
> **Meaning of "substantial"**
> **16(1.1)** An addition, alteration or improvement to the common elements or a change to the assets of the corporation is substantial if
>
> (a) it materially changes the manner in which the common elements are used or enjoyed; or
>
> (b) it increases the operating expenses of the corporation.
>
> **Non-substantial alterations**

> **16(1.2)** The corporation may make any addition, alteration or improvement to the common elements, or change in the assets of the corporation, that is not substantial, provided that the corporation holds a meeting of members convened for the purpose of considering the matter and
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> (a) gives notice of the meeting at least 30 days before the meeting
>
> (i) to members, in accordance with subsection (1.3), including the agenda for the meeting and the text of any proposed motion to be presented by the corporation, and
>
> (ii) by posting a notice in a conspicuous location in the residential complex;
>
> (b) there is a quorum present at the meeting as determined under subsection (1.6); and
>
> (c) at the meeting there is a vote in favour of the matter by the holders of a majority of the voting rights, as set out in the declaration, who are present in person or represented by proxy.

[24] There are some Canadian (but no Manitoba) cases which consider the interpretation and effect of similar provisions.

[25] In *Boychuk v. Essex Condominium Corp. No. 2* (1987), 23 C.L.R. 161 (Ont. Dist. Ct.), the condominium's roofs leaked and had to be replaced. The issue was whether this work required an 80% vote of the unit owners under s. 38(1) of the Ontario *Condominium Act* as a "substantial addition, alteration, improvement to or renovation of the common elements" or whether it was ordinary maintenance or repair effected under the corporation's duty to maintain the common elements under s. 41(3) of the Act. The wording of the Ontario Act was somewhat different from the Manitoba legislation but both Acts employ the phrase "substantial addition, alteration or improvement", although in Ontario the word "renovation" is added. The Ontario Act referred to "major repair and

replacement" of common elements in s. 36(1). The court held that the roof replacement was not a substantial addition, alteration, improvement to or renovation and stated as follows:

> 12 I have also reviewed a great many cases in which all of these terms have been considered by Courts in England and across Canada in cases involving settled estates, real property assessment, landlord and tenant, and municipal by-laws. I do not think it necessary to cite them. They are of assistance in a general way only in showing how the Courts have approached the problem of interpreting words which in some contexts may be synonymous and often overlapping. I proceed on the basis that what is "major" and what is "substantial" are questions of fact to be decided on the evidence in each case. In determining whether or not the work done on or to the property is "repair", "maintenance", "addition", "alteration", etc., it is necessary to look at the state of the property before the work was done, consider the work done as a whole, and compare that with the result.
>
> 13 From the date of the declaration and By-law No. 1, I infer that these buildings were erected about the year 1970. The roof problems are described in some detail in the minutes of various meetings in 1983 and 1984. I do not think it necessary to set out an exhaustive definition of the key words in s. 38(1) because I have concluded that what was done here fits within the general concept of maintenance. The words most aptly describing the work are "major repair and replacement" of common elements in s. 36(1). Section 36(2) requires the Corporation to set up one or more reserve funds. Section 36(1) defines a reserve fund as a fund set up by the condominium corporation for "major repair and replacement of common elements ... including ... roofs ..." Dictionary definitions support the conclusion that maintenance includes repair.
>
> 14 The words "addition" and "alteration" in s. 38(1) connote something added to the structure or some changes in the structure. "Improvement" carries with it the idea of betterment of an existing facility or enhancement in value, not merely replacement of something which was already there and worn out. Whatever "renovation" may be, in my view it does not include replacement of a leaky roof.

[26] The court referred to other relevant cases as follows:

> 8 In *Dyer v. York Condominium Corp. No. 274* (1980), 14 R.P.R. 154 (Ont. H.C.), Hollingworth J., held that the expenditure of $23,800 for caulking to prevent water seeping into the building which caused damage to the floors and walls of the individual units was not within s. 38(1). It was held that this was not a *substantial* addition, alteration, or

> improvement, but was maintenance within the meaning of s. 41. The Court adopted the meaning of "maintenance" in s. 41(3) as set out in Webster's New World Dictionary: to keep up, or to keep in a certain condition, e.g. good repair, to preserve.
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> 9 In *Re Ronita Properties Ltd. and York Condominium Corp. No. 320*, Ont. Co. Ct., January 27, 1981, Cornish Co. Ct. J. considered the expenditure of $140,000 to repair leaking roofs. There were 70 units in the condominium. The Honourable Judge Cornish held that this was not within s. 38(1).



[27] The court also referred to *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983), 148 D.L.R. (3d) 660 (Ont. C.A.). There the roof of a swimming pool which was common to the parties began to leak and had to be repaired. Apparently this was a "repair" and not a wholesale "replacement" of the roof. The leak was caused by a structural defect and not by wear and tear and the issue was whether the cost of the repairs fell within the obligation to repair or maintain under the Ontario condominium legislation. The court held that the statutory duty to repair applied and stated:

> 13 The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.
>
> 14 The declarations of the parties make reference to the "maintenance" and "repair" of the recreational facility. The Shorter Oxford English Dictionary defines these words in part as follows:
>
> > "repair" -- to restore to good condition renewal or replacement of decayed or damaged parts or by refixing what has given way; to mend;

> "maintain" -- to keep in repair;
>
> There is nothing in these definitions that would restrict or narrow their meaning as contended by the appellant. Rather, giving these words their ordinary meaning, they are quite sufficient to encompass the repairs required to the roof of the pool. There is no reason why the appellant should not be obligated to pay its share for the "renewal or replacement of the decayed or damaged parts".
>
> 15 I am strengthened in this position by the decision of the Supreme Court of Canada in *C.P.R. v. G.T.R.* (1914), 49 S.C.R. 525, 17 C.R.C. 300, 20 D.L.R. 56. In that case consideration was given to the word "maintain" which appeared in a contract between the parties. It was decided that in construing the word regard should be had to the relationship between the parties and the scope and nature of their agreement. As a result, the word was held to be extensive enough to include the reconstruction of a bridge so that it could service an increased flow of traffic.

[28] This case illustrates the broad manner in which "repair" and "maintenance" have been construed.

[29] Articles 16 and 17 of the Declarations dealing with "maintenance" and "substantial changes" should be considered:

> 16. Maintenance
>
> The Corporation shall maintain the common elements including but not so as to limit the generality of the foregoing, the parking areas; provided however, that notwithstanding the foregoing, each owner shall be responsible to maintain and keep in good repair all doors providing a means of ingress to and egress from his unit.
>
> 17. Substantial Changes
>
> Vote Required. No substantial changes shall be made to the common elements and no substantial additions shall be made to the common elements or assets of the Corporation unless first approved by a vote of at least 80% of the owners at a meeting of the owners called for that purpose. At any meeting called pursuant to this article, votes against the proposed expenditure shall be called for, counted and recorded before calling for votes in favour of the expenditure.

[30] I don't believe these articles add very much to what is contained in the *Act*. Article 16 simply repeats the requirement in the *Act* to maintain the common elements and article 17 appears to substitute the word "changes" for "alteration" which I think amount to the same thing and the word "additions" is the same as in the *Act*; the word "improvements" has been left out but of course that is covered by the *Act*.

[31] One difficulty in this case is that the windows are not being replaced precisely as they were and there are some changes. These are identified in the evidence of Mr. Turner, the applicant's consultant, and summed up in her brief as follows:

> a. The old window system was made up of three glass panels, including one window that was both large enough and capable of being operated in a fashion that provided an emergency exit from the condo unit. The new window system consists of one large window and one smaller window that, due to its size and the way it opens, does not provide the condo unit with an emergency exit;
>
> b. The new window systems combines two of the existing window panels into one larger window, requiring the window to be of much thicker glass to maintain the same stability and integrity of the existing windows;
>
> c. The changes to the smaller window that can be opened result in an opening that is 50% of the size of the existing smaller windows, resulting in less window ventilation being available to the condo units;
>
> d. The original building plans and design incorporated the existing windows mullion supports as part of the building frame such that the manner in which they were installed was part and parcel of the integrity of the building envelope. The new window systems removal of the mullion supports leaves hundreds of holes in the building frame which must be properly sealed or they will result in a break in the building envelope that could lead to serious future damage to the frame and structure of the building; and

e. The new window system incorporates tinted glass, which is a change to the appearance of the building and will significantly change the quality of the natural light available in each condo unit.

[32] As well, the panels below the windows are being replaced. (Mr. Turner said that new panels are being added between the floors of the building where none had previously existed; but according to the respondent's consultant Mr. Wells, that is not the case and no new panels are being added.)

[33] Also, the stud walls located below the living-room windows in the units are being reinforced with steel studs which, according to Mr. Wells, will reduce movement in the wall system and therefore reduce air leakage and wind-driven rain penetration.

[34] Further, Mr. Wells stated that in addition to the wall reinforcement, new panels being installed have rigid insulation as a backer and that the edges are air-sealed to increase thermal efficiency.

[35] Mr. Turner states that the replacement windows are not of the same type or quality as the old window system and are a substantial improvement over the old windows and are significantly more expensive. Mr. Wells does not expressly disagree, and the thrust of his evidence is to the same effect.

[36] Mr. Turner states that replacement windows that are of a similar quality to the existing windows and of the same design are available. Mr. Wells does not disagree but he does say that it is not possible to use replacement windows of a similar quality or design and at the same time comply with the current Building

Code requirements which were not in effect when the windows were first installed.

[37] Mr. Wells, the respondent's consultant, a licenced professional engineer and a partner at the engineering firm of Crosier, Kilgour & Partners Ltd., has sworn an affidavit in which he has commented on these various points.

[38] Mr. Wells says that the window sizes have not changed and that all new windows are being installed within the confines of the existing rough openings.

[39] He says that the original windows were aluminum frame single pane sliders and that the new windows are also aluminum frame.

[40] He says that the changes are that the new windows are dual pane hermetically sealed with an awning window for venting.

[41] He asserts that awning windows have better inherent performance against air leakage than do slider windows and that the new aluminum frames incorporate a thermal break (to reduce the conduction of heat in the frame assembly) an argon filled cavity (a cavity space between the two panes) and a low emissivity coating, all of which will enhance the thermal performance "energy efficiency" of the windows and the building overall. He says they will also result in a reduction in noise transmission from wind and/or traffic.

[42] He says that originally there were four types of windows and the one type "C", which is the only one referred to in Mr. Turner's affidavit, consisted of four "not three" glass panels and that the new system consists of three glass panels through which a person could not exit the property.

[43] Mr. Wells takes the point that if the new windows were identical to the original windows, they would not comply with the current requirements of the Canadian Standards Association Directive A440 with which replacement windows must comply under the National Building Code.

[44] As far as the window opening being used as an exit is concerned, Mr. Wells notes that the National Building Code defines an exit as “part of means of egress, including doorways, that leads from the floor area it serves, to a separate building, an open public thoroughfare, or an exterior open space protected from the exposure from the building and having access to an open public thoroughfare”. He says that the windows cannot be considered as exits.

[45] He says the windows are within 1,070 millimetres of the floor and are required to act as guards pursuant to the National Building Code to prevent the occupants of any unit from falling to the ground below; as such the strength of the windows must be analyzed for two major loads: a uniformly distributed wind load and a Code prescribed point load that could be applied by an occupant; and that the result of these analyses was that tempered glass of six millimetre thickness is required regardless of whether a mullion divides the windows or not; and this type of glass will have the added benefit of a reduction in noise transmission from wind and/or traffic.

[46] Mr. Wells deposes that because the windows are required to act as guards, the National Building Code limits the openings to one hundred millimetres to prevent small children from passing through the guard.

[47] These are all new Code requirements which did not apply at the time the windows were originally installed.

[48] Mr. Wells affirms that the tinted glass is to address solar gain (interior heat build-up) and to therefore increase occupant comfort and substantially reduce the load on the property's cooling system and associated costs.

[49] Mr. Wells affirms that the new aluminum panels being installed beneath the windows are simply to replace the existing panels and in areas where there is no existing panel none is being added; however, the stud wall beneath the living-room windows is being re-enforced with steel studs to accommodate Parts IV and V of the National Building Code with respect to wind loads on the windows and infill panels; and this will reduce movement in the wall and therefore reduce air leakage and wind-driven rain penetration.

[50] Mr. Turner says that the mullions on the existing windows attach to the building structure and would be costly to remove and replace because the holes where the mullions attach to the structure would have to be sealed. But Mr. Wells says that this is not so and that the mullions do not attach directly to the building structure but rather to the head and sill of the window units and accordingly the removal of the mullions in the new window design does not affect the frame or structural integrity of the building.

[51] Mr. Wells adds that the original window frames do not comply with CSA Directive A440 and cannot be reused. He says that accordingly the design has provided for an installation method (removal of existing window and installation

of a new window that meets Code requirements within the confines of the existing openings). Mr. Wells says he believes that this installation method is the most economically efficient and effective given the existing conditions.

[52] The engineers had targeted fifty units as being particularly problematical and had intended to replace them first. As it turns out, this is really not feasible because they are scattered around the building. Mr. Wells says it is preferable to install the window panels in continuous vertical passes, beginning on the ground floor, to avoid leaving insulation exposed to the elements for any extended period of time.

[53] So for all practical purposes, the whole job needs to be done at one time.

[54] To the extent that there are differences between the affidavits of Messrs. Turner and Wells, I would prefer to rely on the latter. Mr. Wells' firm did the original structural design on the building and he is the consulting engineer who has been working with the new window design from the start and is intimately familiar with it.

[55] I am of the opinion that the essential purpose of the proposed work falls within the definition of "maintenance" as used in the *Act*. The existing windows are ancient, obsolete and, if not wholly worn out, are in the process of wearing out. Broadly speaking, to maintain is to preserve and prevent a decline in the condition of a property. The only way to preserve and prevent a decline in the condition of the windows is to replace them.

[56] Notwithstanding, the applicant says that the windows in her unit are just fine and work perfectly well. She submits that only fifty units have been targeted for immediate attention, suggesting that the other two hundred and fifty are not so bad. That may be so but the question is how long will that remain the case? It seems to me, given the age and obsolescence of the existing window system and the deterioration delineated above, that it may not be long before all of the windows need urgent attention. I agree that it is not reasonable to wait until that happens. The notion of maintenance has been employed in the sense of not only remedying an existing defect but preventing a future defect from developing. See the remarks of Brandon LJ in *ACT Construction Ltd. (supra)*.

[57] But the matter does not end there. The act of maintenance cannot go beyond curing a defect and take in something which is an "addition, alteration or improvement to the common elements" – at least not without a vote; for example, one cannot replace a defective flat roof with a pitched roof under the guise of mere maintenance, although the impetus for the change is no doubt to fix the roof. That would be too drastic a change to qualify as maintenance only. See *ACT Construction Ltd. (supra)*.

[58] First, I think one might safely say that there was no "addition". Mr. Turner thought that some panels were being added but I am satisfied from the evidence of Mr. Wells that this is not so. Nothing is being added.

[59] What about alterations? Much remains the same. No windows are being added or subtracted. They are going into the same openings left by the old windows. They are of the same size and shape. There is a slight difference in the number of panels (from four to three) and differences in the thickness of the window (from single pane to dual pane), and in the transformation from sliding to awning type. These changes are all necessitated by the current Building Code and cannot be helped. If the aim of replacement of the windows is maintenance, as I have found that it is, the only way the maintenance can be achieved is to comply with the current Code and make these changes. Some of the other changes might not necessarily be governed by the Code but they are being employed to increase the energy efficiency of the units and the building.

[60] I appreciate that the windows will no longer be usable as exits. I would have thought that this was of questionable utility in any event. The windows are not "exits" within the meaning of the Building Code and would only be used in rare emergencies by occupants on the very lowest floors. In any event, the Code prevents their being used as such, and the occupants have the solace of knowing that they are safer for their small children or grandchildren.

[61] I also appreciate that the smaller opening may have an effect on the ventilation. However, Mr. Wells points out that the property has a "make-up air system" to provide fresh air to each suite. Anyway, Code requirements dictate the change.

[62] What about improvements? The *Act* actually does give a definition of "improvement" in s. 1 (definitions section):

> **"improvement"** includes any building or structure constructed on or added to a bare land unit after the registration of the declaration and plan; ...

[63] There is of course no such "improvement" here but the definition is not exhaustive. There are certainly no "improvements" in the sense of something being added to the structure. There are "improvements" in the sense of there being an improved window system but, by definition, maintenance will virtually always result in some kind of an improvement or betterment. I do not regard this as the kind of "improvement" envisioned under s. 16 of the *Act*. But the changes do greatly improve the window system.

[64] There may not be any "additions" but there are certainly alterations (or changes, if you will) and improvements to the window system. The new windows will be much superior to the old.

[65] Section 16(1) provides for an 80% vote where there is "any substantial change in the assets of the corporation".

[66] The "assets" mainly affected are the windows which are part of the common elements but the common elements are not assets of the corporation; they are owned by the unit holders. Section 8(2) provides:

> The owners are tenants in common of the common elements and an undivided interest in the common elements is appurtenant to each unit.

[67] There is a reserve fund of approximately $500,000 which is an asset of the corporation. It is the intention of the Board to keep this fund relatively

intact. Exhibit C to the affidavit of the applicant, dated December 16, 2006, is a communication from the directors regarding the project and states that the project budget was designed to maintain the regular reserve fund at about $500,000 and that only when the fund rises substantially above this amount will the Board take money from it for the windows.

[68] So there does not appear to be any substantial change to the reserve fund.

[69] Counsel for the applicant submits that the cost of the window contract affects the reserve fund and constitutes a substantial change in the assets of the corporation. I am not satisfied that this is so. The following subsections are germane:

> **Establishment of reserve funds**
> **26(1)** Every corporation shall establish and maintain a reserve fund, and may establish and maintain one or more additional reserve funds.
>
> **Reserve fund an asset of corporation**
> **26(2)** The money in the reserve fund of a corporation is an asset of the corporation and no part thereof shall be refunded or distributed to any owner of a unit in the corporation except where the owners and the property cease to be governed by this Act.
>
> **Funds under cl.14(1)(a)**
> **26(3)** A fund established under and for the purpose set out in clause 14(1)(a) is not a reserve fund within the meaning of this section.
>
> **Reserve fund to be held by corporation in trust**
> **27(1)** The money in a reserve fund shall be held in trust by and in the name of the corporation in one or more special accounts and is subject to this section and sections 28 to 33.
>
> **Purposes of reserve funds**
> **27(2)** The reserve fund of a corporation shall be used, subject to this Act, for any major repair or replacement of common elements or assets of the corporation including, without limiting the generality of the

> foregoing, roofs, exteriors of buildings, roads, sidewalks, sewers, heating, electrical and plumbing systems, elevators and laundry, recreational and parking facilities, and shall not be used for any other purpose except where a majority of the owners of the units in the corporation agree.

[70] The reserve fund of approximately $500,000 is "the" reserve fund to be used pursuant to s. 27(2) for any major repair or replacement of common elements or assets of the corporation. As I understand it, that fund is going to be maintained at $500,000, and only when it rises substantially above that amount will any part of it be used for the windows.

[71] That reserve fund is clearly an asset of the corporation under s. 26(2) of the *Act*.

[72] Pursuant to s. 26(3), a fund established for the purpose set out in clause 14(1)(a) (for common expenses) is not a reserve fund under s. 26. (Under s. 16(2), the cost of any addition, alteration, etc., is a common expense.) I am not certain whether the special levy constitutes a "reserve fund" but, if so, it is clearly a fund set up for common expenses and forms no part of the main reserve fund of $500,000. And so that fund will not be substantially affected.

[73] Would the funds derived from the special assessment be considered to be an asset of the corporation? I suppose they might be considered to be such but there would also be a corresponding liability in that the corporation would be obliged to pay out the monies to the window contractor. And so presumably there would be no net change in the balance sheet of the corporation. The financial statement of the corporation for the year ended July 31, 2006 was produced and it shows a reserve fund of $185,444.00. That was before the

special assessment began to be collected and there are no further financial statements produced to show how these monies were treated on the balance sheet. No expert opinion accounting evidence was adduced to explain how the assessment would be accounted for and whether it would be regarded as a true asset of the corporation.

[74] I will simply have to leave it that the onus is on the applicant to show a substantial change in the assets of the corporation, and that onus has not been met.

[75] In my view, the work does encompass more than what is strictly required for maintenance. I agree that the windows need to be replaced. Moreover, they need to be replaced with better and more expensive windows in order to comply with the Building Code. There is no avoiding that. If the respondent is to properly fulfill the statutory duty of maintenance that much is inevitable. However, I am not satisfied that all of the changes and improvements inevitably flow from the act of maintenance.

[76] There is the tinted glass, for example. Mr. Turner describes this as a change to the appearance of the whole building. He also says that it will significantly change the quality of the natural light available in each condo unit. The respondent challenges this evidence and questions whether Mr. Turner is qualified to give such an opinion. It is true that Mr. Turner is an “industrial” engineer and not a qualified professional engineer. But he has had considerable experience in the design and installation of specialized window systems and is

doubtless very knowledgeable. Mr. Wells does not challenge this opinion and I do accept that the use of the tinted glass will at least to some degree affect the quality of light coming into the individual units.

[77] Mr. Turner states that the new window panels are to be tinted the same colour as the glass and this too will result in a substantial change to the appearance of the building. He says that the panels do not provide any additional improvement to the insulation of the building and appear to be strictly a change of a cosmetic nature. On the other hand, Mr. Wells says that rigid insulation has been added as a backer for the panels and all panel edges are air-sealed to increase thermal efficiency. I would infer from this that there will be some improvement in the insulation but there is still a question of whether that is an essential change.

[78] I am satisfied that these changes are not merely a function of and go beyond what is strictly required for the proper maintenance of the window system. The next issue is whether they are "substantial" or "non-substantial".

[79] The *Act* gives a special meaning to a "substantial" addition, alteration or improvement, and it is if:

> (a) it materially changes the manner in which the common elements are used or enjoyed; or
>
> (b) it increases the operating expenses of the corporation.

[80] In my opinion, the proposed work does not materially change the manner in which the common elements, that is to say the windows, are used or enjoyed. The windows will be the same size and shape; they will be in the same location;

none will be added and none will be taken away; they will function as windows should function and will make very little difference to the manner in which the individual units are used and enjoyed. There will be some minor differences in the way in which the windows are used with respect to means of egress and ventilation but, in my view, they will not materially affect their use and enjoyment. The tinted glass may affect the light quality but that will be offset by the increased energy savings.

[81] There will be no addition to the expenses of the corporation and, in fact, because the new windows will be more energy efficient there should be a saving in this respect.

[82] The changes are certainly not "substantial" within the meaning of the *Act* and there is no need for an 80% vote.

[83] I pause here to note that the 1997 resolution which purported to define a change in the windows as substantial cannot be regarded as binding on the corporation. The unit holders cannot vote that something is substantial if in fact it is not.

[84] Section 16(1.2) nevertheless provides that additions, alterations or improvements that are "not substantial" should be approved by a majority vote of the unit holders.

[85] The windows are different in type, style and quality. The number of panes is reduced; they are awning rather than sliding; they are dual rather than

single pane; they have additional thermal features; and they will be of tinted rather than ordinary glass.

[86] There will also be some differences in the panels which will be tinted the same colour as the glass and will have more substantial backing.

[87] I would regard these changes as being alterations and improvements that are not substantial but they are alterations and improvements nevertheless.

[88] To a large degree they are necessary for maintenance but to a significant degree they are not; and the unit holders should have been allowed to vote on them.

[89] The respondent relies on s. 16(5) of the *Act* which is as follows:

> **Alterations etc. required by law**
> **16(5)** Notwithstanding anything in this section, the corporation may, without a vote of members, make any addition, alteration or improvement to the common elements or any change in the assets of the corporation that is necessary to maintain the common elements in a state that complies with health, building, and maintenance and occupancy standards required by law, and the cost of doing so is a common expense.

[90] The respondent submits that the fact that a piece of a window fell from the building is evidence that the entire window system is unsafe. There was no evidence as to the precise cause of this incident and I agree that the evidence does not go so far as to demonstrate that the entire window system is currently unsafe to the extent necessary to bring s. 16(5) into play.

[91] The contract should have been approved by a majority vote of the unit holders.

[92] In the result, there will be the following declarations:

(a) that the complete replacement of all existing exterior windows at 55 Nassau Street North is a non-substantial alteration or improvement to the common elements that requires the approval of a majority of unit owners at a duly convened meeting held for that purpose;

(b) that the contract entered into by the respondent with Gardon Construction Ltd. for the replacement work is *ultra vires* the respondent but may be ratified by the requisite majority of the unit holders pursuant to s. 16(1.2) of *The Condominium Act*.

[93] I will not make an order at this time that all work under the contract should cease. Gardon is not before the court and is not a party to these proceedings and I do not wish to make an order at this time which would affect their interests. I am assuming that the respondent will organize the necessary meeting to take the required vote and the contract may well be ratified.

[94] The order which I made stopping any further work under the contract with respect to the units in which the applicant has an interest will remain in effect until the requisite vote is held and majority approval is given.

[95] Costs to the applicant.

_____ J.